BEFORE THE
ILLINOIS COMMERCE COMMISSION

Level 3 Communications, L.L.C.	:	
	:	
Petition for Arbitration Pursuant to Section	:	
252(b) of the Communications Act of 1934,	:	04-0428
as amended by the Telecommunications	:	
Act of 1996, and the Applicable State Laws	:	
for Rates, Terms, and Conditions of	:	
Interconnection with Illinois Bell Telephone	:	
Company (SBC Illinois).		

LEVEL 3 COMMUNICATIONS' REPLY BRIEF ON EXCEPTIONS

Richard E. Thayer, Esq.
Director – Intercarrier Policy
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield CO 80021
(720) 888-2620
(720) 888-5134 Fax
E-Mail: rick.thayer@level3.com

Henry T. Kelly
Joseph E. Donovan
Clark M. Stalker
Kelley Drye & Warren LLP
333 West Wacker Drive
Chicago, Illinois 60606
(312) 857-2350
(312) 857-7095
E-Mail: HKelly@KelleyDrye.com
JDonovan@KelleyDrye.com

Erik Cecil
Victoria Mandell
Regulatory Counsel
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-1319
(720) 888-5134 Fax
E-Mail: erik.cecil@level3.com
E-Mail: victoria.mandell@level3.com

Dated: January 14, 2005

TABLE OF CONTENTS

STATE OF ILLINOIS

BEFORE THE
ILLINOIS COMMERCE COMMISSION

Level 3 Communications, L.L.C.	:	
	:	
Petition for Arbitration Pursuant to Section	:	
252(b) of the Communications Act of 1934,	:	04-0428
as amended by the Telecommunications	:	
Act of 1996, and the Applicable State Laws	:	
for Rates, Terms, and Conditions of	:	
Interconnection with Illinois Bell Telephone	:	
Company (SBC Illinois).		

LEVEL 3 COMMUNICATIONS' REPLY BRIEF ON EXCEPTIONS

Level 3 Communications, LLC ("Level 3"), by and through its attorneys, pursuant the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Admin. Code Part 761.010 *et seq*., files this Reply to the SBC Illinois Brief on Exceptions ("SBC BOE") and the Brief on Exceptions of the Staff of the ICC ("Staff BOE").

INTRODUCTION

On January 7, 2005, Level 3, SBC and Staff all filed their respective Briefs on Exceptions to the Administrative Law Judge's Proposed Arbitration Decision ("PAD"). Level 3 will respond to certain arguments made by SBC and Staff. Level 3's silence as to other issues raised should not be construed as consent or approval of those arguments by Level 3.

I. DEF Issue 11, DEF Issue 12, DEF Issue 18, IC Issue 1, IC Issue 3, IC Issue 6, IC Issue 10, IC Issue13.[1]

In the PAD's conclusion related to DEF Issue 18, the ALJ correctly rejected SBC's proposed use of the term "Section 251(b)(5) Traffic". The ALJ noted that Section 251(b)(5) of the Act "simply establishes the duty of all local exchange carriers to create reciprocal compensation arrangements for 'telecommunications'" PAD, p. 53. As such, there is

> "nothing in the text of the statutory subsection [that] identifies the 'telecommunications' that will be subject to such arrangements. [ftnt] The text of subsection 251(b)(5) simply does not limit reciprocally compensable traffic to a particular geography."

Id. Rather, as the PAD concludes, the term "Section 251(b)(5)" is **not** defined in any FCC order or regulation. SBC's proposed definition is merely SBC's interpretation of that Act and FCC actions, and is improper in the context of this Agreement. Level 3 agrees with the ALJ's analysis, though it does take exception to portions of the ALJ's ultimate conclusion as outlined in the Level 3 Brief on Exceptions.

SBC claims that its proposed definition of "Section 251(b)5) Traffic" is "inherently neutral". SBC BOE, p. 15. In support, SBC regurgitates its claim that the FCC itself has used that term in the *ISP Remand Order* and the *Virginia Arbitration Order*. Id. However, as noted in the PAD (p. 53-54), the ALJ has considered this argument, and soundly rejected it as without basis. SBC presents no new arguments in its Brief on Exceptions that warrant overturning that conclusion now.

Next, SBC agrees with the PAD's statement in response to DEF Issue 18 that "'[t]he text of subsection 251(b)(5) simply does not limit reciprocally compensable traffic to a particular

[1] In its exceptions, SBC presents arguments on a number of separate disputed issues related to the impact of the ALJ's conclusion on the definition of "Section 251(b)(5)". As such, Level 3 will group these separate issues into a single rely for the Commissions deliberation. Failure to address a particular argument in any of these issues should not be viewed as an implicit agreement with SBC on that argument.

geography.'" SBC BOE, p. 16; quoting PAD, p. 55. Rather, SBC claims that attempts to limit the application of its definition to a particular geography "is not the issue". SBC BOE, p. 16. This is an interesting argument to make in light of the manner in which SBC itself has framed DEF Issue 18 for Commission arbitration. According to the Joint DPL submitted with this Commission in August 2004, the Issue Description before the Commission on DEF Issue 18 is as follows:

> (a) Should the Commission adopt a definition of "Section 251(b)(5) Traffic"?
> (b) If the answer to (a) is yes, **should "Section 251(b)(5) Traffic" be limited to certain physical locations of the originating and terminating end users**?

SBC even uses this very issue description in its Brief on Exceptions (p. 15). Thus, in light of the above presentation of the issues as jointly submitted with SBC, it is clear that SBC is wrong when its claims that the application of its definition to a particular geography "is not the issue". Notably, while claiming that geography is "not the issue" as related to its proposed definition of Section 251(b)(5) Traffic, SBC then turns around and urges the Commission to

> "approve SBC's proposed definition of traffic subject to Section 251(b)(5) as **traffic that originates and terminates in the same local exchange area**. SBC § 3.2."

SBC BOE, p. 26. That sure sound a lot like an attempt to impose a geographic standard within the definition of Section 251(b)(5). In other words, SBC's proposed language belies its arguments in the Brief on Exceptions. The Commission should not fall victim to SBC's attempted slight of hand, and certainly should not reward SBC for its ability to argue out of both sides of its mouth.

Further, SBC makes the following statement in its Brief on Exceptions:

> Thus, **ISP-Bound traffic** is not subject to the same rates associated with traffic subject to Section 251(b)(5), as the PAD states, but **is instead subject to the *ISP Remand Order's* declining rate caps**.

SBC BOE, pp. 17-18; citing *ISP Remand Order*, ¶ 8. This statement is a startling and material admission against SBC's position that ISP-Bound Traffic that is FX in nature should be subject not to the *ISP Remand Order's* rate regime, but to bill and keep compensation. As this statement demonstrates, SBC makes no attempt to carve out ISP-Bound Traffic that is FX in nature in this statement. Thus, it seems that even SBC acknowledges that there is no distinction between ISP-Bound Traffic that is subject to the *ISP Remand Order's* rate regime and ISP-Bound Traffic that is FX in nature. As detailed in the Level 3 briefs and as the ALJ rightly held in the PAD, neither the Act nor the FCC have ever treated ISP-Bound Traffic that is FX in nature any different than any other type of ISP-Bound Traffic, nor can this Commission.

Finally, SBC argues that the PAD's recommendation that the parties use the term "local" traffic is inconsistent with federal law. SBC BOE, p. 26. As Level 3 explained in detail in its Brief on Exceptions, Level 3 also takes exception to the ultimate language the PAD adopts (i.e., using either "Telephone Exchange Service" or "local traffic"). It is indisputable that Section 251(c)(2)(A) mandates that SBC exchange with Level 3 any exchange or exchange access services.[2] These types of traffic are defined in the Act as follows:

> 47 U.S.C. § 153(16) Exchange access
>
> The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.
>
> 47 U.S.C. § 153 (47) Telephone exchange service
>
> The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges

[2] 47 U.S.C.A. § 251(c)(2)(A).

> within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

As is clear from the Act's definitions, neither "telephone exchange service" nor "exchange access" service contain any terms limiting these concepts geographically or economically. In other words, the Act was designed to permit carriers such as Level 3 to interconnect and make the most efficient use of its network while ensuring the most efficient use of the PSTN.

When a carrier offers telephone exchange or exchange access services (such as the services offered by Level 3), then it is also eligible to obtain interconnection pursuant to Section 251(c)(2)(A). By ignoring the language in the statute and the relevant FCC orders on the issue and forcing Level 3 to build out and utilize Feature Group Access Trunks to exchange IP-in-the-Middle Traffic, the PAD imputes language and obligations into Section 251 and the definitions of Telephone Exchange Service and Exchange Access Service that do not exist. For the reasons as detailed in the Level 3 Brief on Exceptions, the PAD's adoption of using either "Telephone Exchange Service Traffic" or "local traffic" amounts to a rewrite of Section 251, explicitly ignores the mandate that SBC must interconnect for Exchange Access Services as well as Telephone Exchange Services, and must be altered in order to present an order that is sustainable on appeal.

II. IC Issue 11

Level 3 agrees with the ALJ's determination that ISP-Bound FX/FX-like traffic is subject to reciprocal compensation, not to a bill and keep regime. PAD, p. 160. Level 3 also agrees that, effective under the new Agreement, imposing a compensation regime based upon the *ISP*

Remand Order mandates that ISP-Bound FX/FX-like traffic must be compensated at the rate of $0.0007 per minute of use unless and until the FCC orders otherwise. Id. SBC (BOE, p. 32) and Staff (BOE, pp. 4-7) take exception to the ALJ's determination that ISP-Bound FX/FX-like traffic should be subject to reciprocal compensation, not bill and keep, but do so on the basis of the same arguments the ALJ previously considered and rejected.

In reaching the right conclusion regarding compensation for all ISP-Bound Traffic, including FX ISP-Bound Traffic, the PAD relies in part on the ALJ's interpretation of the recent AT&T/SBC Illinois Arbitration Order, and fails to discuss the merits of Level 3's arguments that the rate of $0.0007 applies to all FX traffic that is ISP-Bound, pursuant to not only the *ISP Remand* Order, but also the recent FCC *Core Forbearance Order* and the *Starpower Decision.*[3] Both of these FCC orders make clear that the FCC makes no distinction between local and non-local ISP-Bound Traffic for purposes of compensation. In both of these orders, the FCC makes clear that the ILEC must pay intercarrier compensation on ISP-Bound FX and FX-like Traffic at the $0.0007 rate prescribed in the *ISP Remand Order*.

Thus, while the ALJ's determinations on this issue are correct and properly apply the compensation rules, the Commission must clarify that its determinations related to applying the compensation regime of $0.0007 per minute for **all** ISP-Bound Traffic, including FX Traffic, is based upon these additional FCC orders applying the governing compensation rules.

Turning to the merits of the Parties' arguments, Staff refers in its Exceptions to a line of Commission orders that Staff opines held "that a bill and keep resolution is fully consistent with

[3] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03171, FCC 04-241, (rel. October 18, 2004) ("*FCC Core Forbearance Order*"); *In the Matter of Starpower Communications, LLC v. Verizon South, Inc*., 2003 WL 22518057, 18 F.C.C.R. 23,625 (rel. Nov. 7, 2003). For a detailed analysis of these FCC orders on applying the compensation rules for ISP-Bound Traffic, please see the Level 3 Initial Brief, pp. 78-84 and the Level 3 Reply Brief, pp. 58-70.

the rules and regulations established by the FCC", purportedly including the *ISP Remand Order*. Staff BOE, . 5-7. Staff is wrong.

This Commission has correctly held that that "with the adoption of the *ISP Remand Order*, the Commission has been divested of jurisdiction to determine compensation issues as they relate to ISP bound calls."[4] In light of that finding and the state of the law at that time, the Commission held in the *Illinois Essex Arbitration Order* that it would impose Bill and Keep for non-ISP-Bound FX Traffic.[5] The Commission has upheld that conclusion in a number of arbitrations and applied its logic to ISP-Bound Traffic as well, including the *Illinois Global NAPs Order*.

In making the underlying determination in the *Illinois Essex Arbitration Order*, the Commission relied heavily on an the logic and conclusions found in an arbitration order from the Texas Public Utilities Commission, which interpreted the FCC's *ISP Remand Order*.[6] In summarizing the Texas decision, the Commission stated as follows:

> With this preface in mind, the [Texas] Arbitrators adopted bill-and-keep as the compensation regime for FX-type calls, based upon the following reasoning. **Adopting a bill-and-keep compensation mechanism for FX service would be consistent with the FCC's determination that bill-and-keep is appropriate for carriers that have entered new markets for ISP traffic**. A strong indication of the FCC's preference for bill-and-keep as a future compensation mechanism is its determination in the ISP Remand Order that in cases where carriers are not exchanging traffic pursuant to interconnection agreements prior to the adoption of the ISP Remand Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served), bill-

[4] *Essex Telecom, Inc. v. Gallatin River Communications, L.L.C.*, Docket No. 01-0427, Order (Ill. C.C. July 24, 2002) at 8 ("*Illinois Essex Arbitration Order*").

[5] *Illinois Essex Arbitration Order*, at ¶ 89. The Commission has upheld that conclusion in a number of arbitrations and applied its logic to ISP-Bound Traffic as well, including *Illinois Global NAPs Order*., 2002 WL 31477275 (Ill.C.C, October 1, 2002.); *In re AT&T Communications of Illinois, Inc*., Docket No. 03-0239, 2003 WL 22518548 (Ill.C.C., 2003) ("We conclude that the ISP Bound FX Traffic between AT&T and SBC will be subject to bill and keep."

[6] *Illinois Essex Arbitration Order*, ¶ 89.

> and-keep would serve as the inter-carrier compensation mechanism for ISP-bound traffic until further order.

Thus, based on the Texas Arbitration decision that Bill and Keep was appropriate for carriers that have entered into new Markets (i.e., the New Markets Rule) for ISP Traffic found in the FCC's *ISP Remand Order*, this Commission also adopted Bill and Keep. However, the FCC's recent *Core Forbearance Order* specifically rejects that finding of the *ISP Remand Order* related to Bill and Keep. In the *Core Forbearance Order*, the FCC announced that the Growth Cap and New Market Rules adopted in the *ISP Remand Order* that imposed a Bill and Keep regime for ISP-Bound traffic "are no longer necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory."[7] The FCC made no distinction between local and non-local ISP-Bound Traffic in making this determination. SBC's and Staff's attempts to inject such a distinction in the compensation regime are without merit, and unsupported by the applicable FCC orders.

In further support of its position, Level 3 has also relied on the FCC's recent *StarPower* decision, in which the FCC confirmed that Verizon must pay intercarrier compensation on ISP-Bound VNXX traffic (rather than having Bill and keep, or having access charges apply to these calls.)[8] In the underlying case, Verizon withheld intercarrier compensation payments from StarPower asserting that some of the ISP Bound traffic was long distance VNXX traffic. Much of the traffic in question originated from Virginia, and terminated to StarPower's ISP customer with modem banks located in Lanham, Maryland.[9] In the *StarPower Damages Order* the FCC stated in a footnote that it did not specifically address the legal question of whether incumbent

[7] *FCC Core Forbearance Order*, ¶ 24.

[8] *In re StarPower Communications v. Verizon South*, 04-102, EB-00-MD-19, Order (rel. April 21, 2004.)

[9] *In re StarPower Communications v. Verizon South*, 04-102, EB-00-MD-19, Memorandum Opinion and Order (rel. Nov. 7, 2003) ("*StarPower Damages Order".)*

LECs have an affirmative obligation under sections 251(b)(5) and 252(d)(2) of the Act to pay reciprocal compensation for virtual NXX traffic.[10] However, subsequent to its November *Damages Order* StarPower and Verizon settled their disputes, and requested that the FCC vacate the *Damages Order* so that there would be no precedential value to the FCC's ruling. The FCC declined to vacate its ruling on the basis that it believed the *Damages Order* served as an important precedent with respect to the proper treatment of VNXX ISP-Bound traffic:

> We are reluctant to eliminate any precedential effect that the *Damages Order* may provide on the issue of reciprocal compensation when the parties only can state, at best, that the *Damages Order* potentially could generate unspecified litigation between the parties in the future. In particular, the *Damages Order* is the first time that the Commission has adjudicated an interconnection agreement dispute concerning reciprocal compensation obligations associated with the delivery of virtual NXX traffic.

Level 3 has also pointed out that the FCC Wireline Competition Bureau has rejected ILEC efforts to impose bill and keep for ISP-Bound FX traffic. In the *Virginia Arbitration Order*, Verizon's contract terms were summarized as follows:

> Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intraLATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.[11]

The FCC rejected Verizon's attempts to impose a bill and keep regime for FX ISP-Bound traffic:

> We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. ***We therefore accept the petitioners' proposed language and reject***

[10] *Id.*, fn. 68.

[11] *FCC Virginia Arbitration Order* at ¶ 286.

> ***Verizon's language that would rate calls according to their geographical end points.*** Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[12] (emphasis added).

In spite of this long history of FCC actions supporting Level 3's position, and that adopted in the PAD, Staff and SBC still insist on imposing bill and keep on ISP-Bound Traffic that is FX in nature. Just as the FCC Competition Bureau rejected the ILEC's attempt to impose a bill and keep compensation regime for ISP-Bound FX Traffic, so too must this Commission. In fact, under the FCC's holdings in the *ISP Remand Order* mandating that only the FCC can establish intercarrier compensation rules for ISP-Bound traffic, the only manner in which the Commission can address the underlying issue raised in this arbitration is to adopt Level 3's proposal to apply a uniform rate of compensation for all ISP-Bound Traffic.

III. ITR Issue 1, ITR Issue 18, and IC Issue 2

The ALJ appropriately determined that Level 3's IP-TDM services are similar to those IP-Enabled Services provided by Vonage and, thus, subject to the FCC's determination as to what is the appropriate compensation regime to establish for such services. PAD, pp. 100-101, 117. Level 3 applauds the ALJ's determination. There is no FCC or ICC precedent imposing **any** access charges on such IP-Enabled Traffic, and the ALJ rightly declined the opportunity to do so in this proceeding by rejecting SBC's proposed contract terms. SBC takes exception to the PAD's resolution of ITR Issue 1 to the extent it is inconsistent with SBC's position that the Agreement should use the term "251(b)(5) Traffic" to denominate traffic subject to section 251(b)(5) of the 1996 Act. SBC BOE, p. 39. As outlined herein with respect to DEF Issue 18

[12] *FCC Virginia Arbitration Order* at ¶ 301.

and related disputes, SBC's position is without merit and should be rejected. The ALJ rightly discarded SBC's proposed definition of "Section 251(b)(5) Traffic", and SBC has presented no new arguments in its Exceptions that would warrant reversal of that determination.

Similarly, SBC takes exception to the PAD's resolution of ITR Issue 18 and IC Issue 2 by repeating the same arguments (SBC BOE, pp. 19-22, 40) contained in its Initial and Reply Briefs, which arguments the ALJ considered, discussed, and rejected in his PAD. The Commission must reject SBC's arguments, as the ALJ did in the PAD.

As Level 3 urged in its Brief on Exceptions, however, the Commission must make clear that a finding that IP-Enabled services are excluded from the ICA results in the Parties not imposing any form of compensation – access, reciprocal compensation or bill and keep – for IP-TDM Traffic unless and until the FCC addresses the issue in its open proceedings. Moreover, with respect to the implication of the Commission's finding that IP-Enabled services are excluded from the ICA on the trunking and interconnection issues raised in this arbitration, Level 3 seeks confirmation that neither Party's IP-Enabled services terms were adopted. That is, the ALJ has **not** adopted SBC's language precluding IP-TDM Traffic over the interconnection trunk groups. The Commission must make clear that it is not adopting any term or condition in the agreement that could be construed by SBC to mean that the ICC has approved of SBC's practice of requiring Level 3 to establish Feature Group D access trunks to exchange IP Enabled traffic.

As recommended in Level 3's Exceptions, the Commission should modify the last full paragraph related to Level 3 IC Issue 2(a) as follows:

> That said, we concur with Staff that the ICA must expressly and unequivocally state that IP-Enabled services are excluded from the ICA and that none of the ICA's rates, terms and conditions apply directly or indirectly to such services. <u>As such, we make clear that we are not adopting SBC's proposed language precluding IP-TDM over the interconnection groups.</u> When the FCC issues relevant decisions, such exclusionary

provisions in the ICA may need to be revised, pursuant to the ICA's change-of-law provisions, in order to comply with the FCC.

IV. GTC Issue 3

In its Brief on Exceptions, SBC objects to the PAD's recommended conclusion regarding GTC Issue 3 – the trigger for an assurance of payment. The ALJ concluded that it is appropriate that the ICA contain terms that authorize a deposit demand in the event of credit impairment. However, such impairment must be more than *quantitatively* trivial and, to make that determination, the parties should identify the specific types of information that will be factored in, and the objective standard for identifying impairment. The ALJ gave two examples, those being a downgrade from two examples of what he would deem to be an event of credit impairment – a downgrade by either Standard & Poor's or Moody's.

SBC's first dispute is that the PAD reaches beyond the dispute presented by the parties' competing contract language. SBC BOE, p. 2. SBC states that the only issue is the inclusion of the words "significant and material." SBC fails to recall that also in dispute was the phrase "credit, financial health, or creditworthiness", which is directly on point with the ALJ's conclusions in the PAD. The phrase "credit, financial health, or creditworthiness" was not agreed-to language as SBC seems to be indicating.

SBC's second contention is that the PAD fails to resolve the parties' disagreement. SBC BOE, p. 3. While the ALJ sets forth guidelines for future drafting on this subject (PAD, p. 10), SBC presents in its exceptions – for the first time – newly-proposed language does not solve the problem. Specifically, SBC proposes the following language be inserted into the Agreement:

> At any time on or after August 1, 2004, there has been a significant and material impairment of the established credit, financial health, or creditworthiness of LEVEL 3 as compared to its status on August 1, 2004. For purposes of this provision, a significant and material impairment is a downgrade by Standard and Poor's and/or Moody's credit rating service

from LEVEL 3's rating as of August 1, 2004.

SBC BOE, p. 3.

SBC's language is unacceptable. First, because SBC has never presented the language to Level 3 for review or negotiation, it is beyond the scope of this arbitration, and it is improper for the Commission to even consider the proposal *ab initio*. Further, while the language refers to a Standard and Poor's and/or Moody's downgrade, it is silent as to whether such downgrade is, in fact, an indication of an impairment of a Party's ability to pay its bills. A downgrade does not demonstrate that a party is in jeopardy of defaulting on its obligations. A downgrade can occur many reasons. For example, a company can be in the process of a temporary debt reorganization such that the ability to rate the organization is in temporary limbo. This situation can cause the credit rating organization (i.e., Moody's or Standard and Poor's) to exercise excess caution, thereby downgrading the company – though that fact does not impact the company's ability to pay its bills.

Again, Level 3 cites to the *Verizon Policy Statement*[13] in support of its position. In the *Verizon Policy Statement*, the FCC held that "[b]road, subjective triggers that permit the incumbent LEC considerable discretion in making demands, such as a decrease in 'credit worthiness' or 'commercial worthiness' falling below an 'acceptable level' are particularly susceptible to discriminatory application."[14] SBC's newly offered language continues to have the same defect – reliance on a decrease in a purported "credit worthiness" falling below an "acceptable level".

[13] *Verizon Petition for Emergency Declaratory and Other Relief*, Policy Statement, WC Docket No. 02-202, FCC 02-337 (rel. December 23, 2002) ("*Verizon Policy Statement*").

[14] *Verizon Policy Statement*, ¶ 21.

For these reasons, and those outlined in the Level 3 Brief on Exceptions, the Commission should reject the ALJ's conclusions on this issue, as well as SBC's self-serving and untimely proposals, and adopt Level 3's far more rationale approach of requiring a certain threshold be met prior to allowing SBC to demand an assurance of payment. .

V. GTC Issue 7

SBC contends that the PAD's conclusion in GTC Issue 7 will not sufficiently protect it against Level 3's failure to pay undisputed bills. SBC BOE, p. 5. SBC contends that if Level 3 does not pay for service X, then in all likelihood it would not pay for service Y. SBC's rationale is pure conjecture. The record is void of any evidence supporting SBC's claim, and SBC sets forth no examples to support this assertion. Rather, SBC merely posits that the CLEC is most likely in poor financial health and not likely to pay for the service Y if it did not pay for service X. SBC leaves no room for other reasons for unpaid bills, such as disputes that involve particular network elements, particular rates assessed, collocation facilities, and/or interconnection arrangements; or there may be a bill for a particular unbundled network element that the Parties have not yet agreed on how to handle. Level 3 Brief on Exception, p. 16. Level 3's rationale is far more plausible and provides SBC with sufficient safeguards against the unlikely event that a bill goes unpaid.

SBC presents no new or convincing arguments that would warrant reversing the ALJ's sound decision on GTC Issue 7. As such, the Commission should adopt his findings as their own.

VI. F Issue 3 and IC Issue 20(a)

The PAD rejects Level 3's proposed definition of "Circuit-Switched IntraLATA Toll Traffic". PAD, pp. 32, 180. According to the PAD, there is no need for such a definition due to

the finding that the Agreement shall not include any terms related to IP-Enabled Services, and the agreement between the Parties that IP-in-the-Middle traffic is subject to compensation based on tariffed access rates. Id. SBC takes exception to the rationale for the PAD's conclusion, which is that the Agreement should not deal with IP-enabled traffic in any way. SBC BOE, p. 10. As explained in the Level 3 Brief on Exceptions, both the PAD, and now SBC, miss a key underlying point.

Through its orders and regulations, the FCC has distinguished between Circuit Switched Traffic and IP-Enabled Traffic, finding that IP-Enabled Traffic is not a Circuit-Switched form of traffic. As detailed in the Level 3 Initial and Reply Briefs, there are a number of results that differentiate the two types of traffic, not the least of which is that access charges apply to toll Circuit Switched Traffic and not to information services such as ISP-Bound Traffic and IP-Enabled Traffic. By refusing to include a definition for this type of Circuit-Switched Traffic, the PAD fails to account for such a distinction. Further, even if the Commission agrees with the ALJ that IP-Enabled terms are not appropriate in the Agreement, IP-Enabled Traffic is not the only type of information service traffic that would be impacted by Level 3's proposed language. In addition to IP-Enabled Traffic, the proposed "Circuit Switched IntraLATA Toll Traffic" definition would clarify that any other form of information services traffic would not fall under the definition of Circuit Switched IntraLATA Toll Traffic and, thus, not be subject to access charges.

Further, Level 3's proposed definitions of IP-Enabled Traffic and Circuit Switched Traffic are derived directly from FCC Orders and regulations, namely the FCC's recent *AT&T IP*

Order.[15] In that order, the FCC found that services that have the following characteristics are **not** "Information Services" traffic, but rather, a telecommunications service:

> (1) the Carrier holds itself out as providing voice telephony or facsimile transmission service;
>
> (2) the Carrier does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network;
>
> (3) the Carrier allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and
>
> (4) the Carrier transmits customer information without net change in form or content.[16]

The FCC held that "this type of phone-to-phone IP telephony lacks the characteristics of an information service and bears the characteristics of a telecommunications service." As a telecommunications service, the service relies upon the Circuit-Switched network for processing the traffic (*i.e.*, there is no net protocol of the traffic, so it remains traffic carried over the Circuit Switched network). In light of the PAD's respect for the FCC's authority to address these IP-Enabled issues, as expressed throughout the PAD, it is appropriate to faithfully impose the FCC's determinations from the *AT&T IP Order* on this issue as well. The Agreement should include a definition to capture such traffic. Level 3's proposed definition of "Circuit Switched IntraLATA Toll Traffic", and the related language in the Intercarrier Compensation Appendix, properly incorporates this distinction, consistent with the FCC's holdings, and should be incorporated into the final agreement. The Commission should reject SBC's proposed modifications (SBC BOE, p. 10) to the Commission's Analysis and Conclusions on this issue.

---

[15] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (rel. April 21, 2004)

[16] *Id.*, ¶ 8.

As recommended in Level 3's Exceptions, the Commission should replace the Analysis and Conclusions related to DEF Issue 3 with the following:

> We find that Level 3's definition of "Circuit Switched IntraLATA Toll Traffic" shall be adopted for GTC DEF Issue 2. Level 3's definition of "Circuit Switched IntraLATA Toll Traffic" is reasonable. We agree with Level 3's assessment that the FCC distinguished between Circuit Switched Traffic and IP-Enabled Traffic. As such, it only seems appropriate to include a definition of "Circuit Switched IntraLATA Toll Traffic" so as to avoid any confusion on what type of traffic is included. Importantly, the FCC has provided a definition of the term in its recent *AT&T IP Order*, which Level 3 supports and uses as the basis for its proposed language. We find this an appropriate source for the definition.
>
> Therefore, we adopt Level 3's definition of "Circuit Switched IntraLATA Toll Traffic" and reject the definition offered by SBC.

In addition, the Commission should modify the Analysis and Conclusion related to IC Issue 20(a) as follows:

> In our resolution of Issue ITR-18(d) above, which incorporated our resolution of Issue DEF-3, we determined that a definition of "Circuit Switched Traffic" is <u>appropriate</u> to the Parties ICA. Therefore Level 3's proposed insertion of "Circuit Switched Traffic" is <u>adopted</u>, <u>and we reject SBC's proposed Section 14.1</u>.

VII. DEF Issue 4

SBC takes exception to the PAD's ruling for DEF Issue 4, which rejected its definitions of "declassified" and "declassification." SBC states that this issue is now moot given that its UNE Appendix was not adopted. SBC BOE, p. 11. Level 3 disagrees. The PAD correctly includes rationale as to how it came to its decision, and how that decision is consistent with past ICC arbitration decisions. PAD, p. 34. At bottom, SBC's logic in this context is circular. SBC argues that if the Commission's decision on a particular issue is going to be moot, then the Commission need not actually make that decision that rendered it moot in the first place. That begs the obvious question – how can one know the decision was moot without the decision actually being made?

The bottom line is that the Parties have presented an issue for Commission deliberation, and the PAD has met that obligation. SBC presents no sustainable argument as to why the Commission should shirk its duty to address an issue legitimately presented jointly by both parties.

VIII. DEF Issue 8, IC Issue 5 and IC Issue 15

SBC and Staff contend that the PAD's ruling (pp. 41-42, 137, 171) to reject SBC's definition of "ISP-Bound Traffic" was in error because such a finding is inconsistent with the FCC's *ISP Remand Order* and Commission precedent. SBC BOE, p. 28; Staff BOE, pp. 8-9. SBC and Staff are wrong on both counts.[17]

The PAD properly rejects SBC's proposed definition of ISP-Bound Traffic in GTC DEF Issue 8 because SBC attempts to impose a geographic requirement to define a type of traffic. As the PAD properly concludes, there is no nexus between the physical locale of the calling party and the ISP. Rather, the FCC has held that all ISP-Bound Traffic is interstate in nature and subject to the compensation scheme developed in the *ISP Remand Order*. PAD, p. 41. SBC even acknowledges that fact in its Brief on Exceptions, p. 26, wherein it admits that

> **ISP-Bound traffic** is not subject to the same rates associated with traffic subject to Section 251(b)(5), as the PAD states, but **is instead subject to the *ISP Remand Order's* declining rate caps**.

SBC BOE, pp. 17-18; citing to *ISP Remand Order*, ¶ 8. Level 3 agrees with SBC, and notes that even SBC does not carve out ISP-Bound Traffic that is FX in nature from the above statement of the law. Neither should this Commission, as the PAD finds.

[17] Staff did not address DEF Issue 8 in either its testimony or prior briefs, but does so here in light of the interrelated nature of DEF Issue 8 and IC Issues 5 and 15.

The PAD finds that Level 3's proposed language is consistent with the language used in FCC orders in two critical respects: (1) Level 3's proposed language clarifies that ISP-Bound Traffic is originated as Circuit switched traffic terminating at an ISP customer of the other Party; and (2) the *ISP Remand Order* does not contain a requirement that the calling parties be physically located in a certain geographic location in order to make ISP-Bound Traffic. These findings are consistent with SBC's admission in its Brief on Exceptions detailed above, and totally undermine SBC's proposed language in GTC DEF Issue 8. In short, SBC is attempting to create new requirements that are not even considered under the applicable laws governing ISP-Bound Traffic. Thus, the PAD properly rejects SBC's proposed language as inconsistent with the FCC's *ISP Remand Order*. So, too, must this Commission.

Further, as for IP-Enabled Services, the FCC's recent *Vonage Order* makes it clear that a service which "harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they can find a broadband connection, and to manage their communications needs from any broadband connection," coupled with the "Internet's inherently global and open architecture" removes the need for a "correlation between Vonage's DigitalVoice service and its end-users' geographic locations."[18] The FCC found that:

> The geographic location of the "termination" of the communication is the other clue; yet this is similarly difficult or impossible to pinpoint. This "impossibility" results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously, none of which the provider has a means to track or record.[19]

[18] *Id.*, ¶ 24.

[19] *Id.*, ¶ 25. (Footnotes omitted).

The FCC noted that the VoIP service "functionalities in all their combinations form an integrated communications service designed to overcome geography, not track it."[20] The FCC found that "these integrated capabilities and features are not unique to DigitalVoice, but are inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities based providers."[21]

Moreover, the FCC noted that in the world of these IP-based services, the NPA-NXX of originating and terminating parties is divorced from geography. A call which appears to originate and terminate in the same NPA-NXX could just as easily, in the IP-Enabled services world, originate and terminate on opposite sides of the globe.[22] The FCC noted that it intends to resolve comprehensively the issues of regulation of these IP-Enabled services in its IP-Enabled Services proceeding, including matters of intercarrier compensation.[23]

The FCC's *Vonage Order* weighs significantly in favor of adopting Level 3's terms and conditions on intercarrier compensation and VNXX calling (FX-like services). The FCC recognizes that the location of the calling and called parties in an IP-Enabled services world is essentially undeterminable, and that the NPA-NXX of the originating and terminating carrier governs the compensation to be exchanged by the parties. VNXX traffic (FX-like traffic) as a distinct category of traffic gets swept away in this new universe, because no exchange is foreign

[20] *Id.*

[21] *Id*., ¶ 25, n. 93. Among those providers which submitted comments and whose services or planned services are cited by the FCC in support of this conclusion is none other than SBC.

[22] *Id*., ¶ 27.

[23] *Id*. at 8, fn. 46. The FCC says, in effect, in this footnote that its jurisdictional ruling is designed to make it clear that there will be no state regulation of these IP-Enabled services, as the FCC sorts out whether and how to regulate IP-Enabled services.

and all exchanges are foreign. It just does not matter, because all are just numerical correlations of IP addresses and are not tied to the physical location of the communicating parties.[24]

IX. DEF Issue 16

Level 3 disagrees with SBC's contention that a definition of "Out of Exchange LEC" be included in the Agreement. Given the PAD's conclusion that the OET Appendix be properly excluded, the definition of "Out of Exchange LEC" serves no purpose. SBC has put forth no evidence to suggest otherwise. Even if the Agreement erroneously included the OET Appendix, the term "Out of Exchange LEC" should not be included since it is a term invented by SBC and would only serve to confuse or mislead, as one would assume that a LEC who is out of the exchange is not in the exchange. Level 3 Initial Brief, p. 51. Thus this definition should not be included in the Agreement; and the language in the PAD should not be amended..

X. DEF Issue 17

Similarly with DEF Issue 16, SBC contends that the ICA should include a definition of "Out of Exchange Traffic." SBC BOE, p. 14. Level 3 disagrees. The PAD correctly excludes the OET Appendix, thus this definition serves no purpose. SBC has not put forth any rationale to conclude otherwise. Moreover, as pointed out in Level 3's Initial Brief, SBC's definition excludes some types of traffic from the definition that should be included as part of interconnection. Thus this definition should not be included in the Agreement; and the language in the PAD should not be amended..

[24] In describing Vonage's DigitalVoice service, the FCC stated, "Rather, as Vonage explains, the [telephone] number correlates to the user's digital signal processor to facilitate the exchange of calls between the Internet and the PSTN using a convenient mechanism with which users are familiar to identify the user's IP address. In other words, and again in marked contrast to traditional circuit-switched telephony, a call to a Vonage customer's NANP number can reach that customer anywhere in the world and does not require the user to remain at a single location." *Vonage Order*, ¶ 8. (Footnotes omitted).

XI. OET Issues 1-11

Initially, SBC argues that "the Parties agreed that their interconnection agreement would include an "Out of Exchange Traffic," or "OET" Appendix." SBC BOC, p. 42. Considering the fact that Level 3 spent substantial effort in its testimony and briefs arguing against the adoption of the OET Appendix, this is a puzzling statement to make. For instance, in his direct testimony, filed with the Petition in June 2004, and again in the direct testimony made a part of this record, Level 3 witness Wilson testified as follows:

> I would advise the Commission to remove this [OET] appendix from the interconnection agreement. The appendix is unnecessary, confusing, and duplicative. The ITR and NIM appendixes adequately specify all of the requirements for interconnection. There is no need to supplicate them in the OET appendix. The OET appendix provides no useful guidance for interconnection and is unique to SBC. No other ILEC has such requirements.

Wilson Direct, p. 48. Level 3 followed up on this testimony in its Initial Brief (pp. 200-202) arguing specifically that "SBC's propose [OET Appendix] is confusing, unnecessary and duplicative" and that "there is not need to address the OET terms because they are already covered in the Agreement." This hardly sounds like an agreement to include the OET Appendix. Thus, SBC's claim that Level 3 agreed to include the OET Appendix in the agreement is patently false.

Further, this Commission should note that the Indiana Utility Regulatory Commission has entered an order in a parallel arbitration between Level 3 and SBC that also rejects the inclusion of an OET Appendix. As the Indiana Commission notes, "[t]here are no unique problems associated with such traffic and the current provisions in the NIM and ITR Appendices adequately address the issues. Thus, we will discard the OET Appendix …" Indiana Utility Regulatory Commission Decision in Cause No. 42663 INT-01**,** p. 171.

The ALJ fully assessed the merits and arguments of the inclusion of an OET Appendix and properly rejected SBC's attempt to insert it into the Agreement. SBC has no additional rationale or evidence that would necessitate reversing the ALJ's well-reasoned conclusion.

WHEREFORE, Level 3 respectfully requests that the Commission reject the Exceptions to the Proposed Arbitration Decision filed by SBC and Staff. For all the reasons stated above, and for all the reasons contained in its Petition, Testimony and Briefs, Level 3 respectfully requests the Commission revise the Proposed Arbitration Decision consistent with Level 3's recommendations outlined in its Brief on Exceptions.

Dated: January 14, 2005

Respectfully submitted,

LEVEL 3 COMMUNICATIONS, LLC

_____

By: One of its attorneys

Richard E. Thayer, Esq.
Director – Intercarrier Policy
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield CO 80021
(720) 888-2620
(720) 888-5134 Fax
E-Mail: rick.thayer@level3.com

Henry T. Kelly
Joseph E. Donovan
Clark M. Stalker
Kelley Drye & Warren LLP
333 West Wacker Drive
Chicago, Illinois 60606
(312) 857-2350
(312) 857-7095
E-Mail: HKelly@KelleyDrye.com
JDonovan@KelleyDrye.com

Erik Cecil
Victoria Mandell
Regulatory Counsel
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-1319
(720) 888-5134 Fax
E-Mail: erik.cecil@level3.com
E-Mail: victoria.mandell@level3.com

TABLE OF CONTENTS

Page